

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Wisconsin Resources Protection
Council, Center for Biological
Diversity, and Laura Gauger,

Plaintiffs,

v.

Case No. 11-cv-45

Flambeau Mining Company,

Defendant.

PLAINTIFFS' PROPOSED SPECIAL VERDICT FORM

Plaintiffs, by their undersigned counsel, submit the attached Proposed Special Verdict Form in accordance with the Court's Preliminary Pretrial Conference Order dated April 7, 2011 (Dkt. #12) and the Court's Order in Non-Jury Cases.

The Court finds as follows:

Remaining Issues for Liability

Question No. 1: Do the pollutants discharged from the Biofilter reach a water of the United States because:

The pollutants enter Stream C south of Copper Park Lane? _____ (yes/no);

or

The pollutants enter an intermittent waterway or wetland north of Copper Park Lane that is itself a “water of the United States” because it is a continuation of Stream C, is adjacent to Stream C, or, either alone or in combination with other wetlands and waterways in the Stream C watershed, has a “significant nexus” with the Flambeau River? _____(yes/no);

Question No. 2: If “yes” to any of the above, on which dates did the Biofilter discharge to a water of the United States? [The dates the Court already found undisputed discharges from the Biofilter are as follows: August 3, 2006; October 4, 2006; November 28, 2006; May 24, 2007; September 21, 2007; April 25, 2008; October 27, 2008; April 25, 2009; October 3, 2009; April 16, 2010; September 17, 2010; October 26, 2010; April 27, 2011; and June 19, 2011 (Dkt # 137 at p. 17, (citing PPFOF ¶¶ 101-130, dkt # 52))]

Issues for Remedy

Based on the above findings:

Question No. 1: Should the Court declare that Defendant violated the Clean Water Act by discharging pollutants into waters of the United States in violation of 33 U.S.C. § 1311(a)? _____ (yes/no)

Question No. 2: Should the Court enjoin the Defendant from discharging pollutants into a water of the United States unless authorized to do so under a permit issued pursuant to section 402 of the Clean Water Act? _____ (Yes/No)

Question No. 3: Should the Court should assess the statutorily presumptive civil penalty of \$32,500 for each of _____ [number of dates] violations that occurred before January 12, 2009, and \$37,500 for each of _____ [number of dates] violations that occurred after January 12, 2009? _____ (yes/no)

If "no" and a decrease in the presumptive rates is warranted, which of the following mitigating factors of 33 U.S.C. § 1319(d) are present? Check all that apply:

- _____ The seriousness of the violation or violations;
- _____ The economic benefit (if any) resulting from the violation;
- _____ Any history of such violations;
- _____ Any good-faith efforts to comply with the applicable requirements;
- _____ The economic impact of the penalty on the violator; and
- _____ Such other matters as justice may require.

Based on the above, what amount of penalty per violation should be assessed?

\$_____ for violations before January 12, 2009 x _____ [# of violations] = _____

\$_____ for violations after January 12, 2009 x _____ [# of violations] = _____

Total penalty: \$_____

Question No. 4: Should the Court require Defendant to pay an appropriate sum for a Supplemental Environmental Project to benefit the water quality of Stream C and the Flambeau River and to further the economic, recreational, and aesthetic use of the Flambeau River by the public? _____(yes/no).

If yes, in what amount? \$_____

Question No. 5: Are Plaintiffs are entitled to an award of their costs of litigation (including reasonable attorney and expert witness fees) under 33 U.S.C. § 1365(d)?

_____ (yes/no)